

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1139 of 2016

Arising Out of PS. Case No.-15 Year-2014 Thana- GOVERNMENT OFFICIAL COMP.
District- Patna

Md. Khalik Son of Late Md. Nankau Resident of Village- Basawanpur,
Kamrawan, P.S.- Jadpur, District- Barabanki, State- U.P.

... .. Appellant.

Versus

The Union of India through Directorate of Revenue Intelligence, Regional
Unit, Patna

... .. Respondent.

WITH

CRIMINAL APPEAL (DB) No. 1060 of 2016

Arising Out of PS. Case No.- Year-1111 Thana- District-

Jamir Alam Ali Son of Md. Jahur Ali resident of Village- Thoubal Moijing
Awang Laikai, P.O., P.S. and District- Thoubal, State- Manipur.

... .. Appellant.

Versus

The Union of India through Directorate of Revenue Intelligence, Regional
Unit, Patna

... .. Respondent.

WITH

CRIMINAL APPEAL (DB) No. 1147 of 2016

Arising Out of PS. Case No.-15 Year-2014 Thana- GOVERNMENT OFFICIAL COMP.
District- Patna

Md. Furkan Son of Amusana, Resident of village- Thoubal Moising
Kangjaibung, P.O, and P.S.- Thoubal, District- Thoubal (Manipur).

... .. Appellant.

Versus

1. The State of Bihar.
2. The intelligence Officer, Office of the Directorate of Revenue Intelligence
(DRI), Regional Unit, Patna.

... .. Respondent.



Appearance :

(In CRIMINAL APPEAL (DB) No. 1139 of 2016)

For the Appellant : Dr. Brahma Deo Prasad, Advocate.
: Mr. Dhananjay Nath Tiwary, Advocate.
: Mr. Bikram Deo Singh, Advocate.
: Mr. Arun Kumar Tiwary, Advocate.
: Mr. Binoy Kumar Sinha, Advocate.
For the Respondent : Mr. Ramakant Sharma, Senior Advocate.
(D.R.I.) : Mr. Alok Ranjan, JC to CGC

(In CRIMINAL APPEAL (DB) No. 1060 of 2016)

For the Appellant : Dr. Brahma Deo Prasad, Advocate.
For the Respondent : Mr. Ramakant Sharma, Senior Advocate.
(D.R.I.) : Mr. Radhika Raman, C.G.C.

(In CRIMINAL APPEAL (DB) No. 1147 of 2016)

For the Appellant : Mr. Diwakar Upadhyaya, Advocate.
: Mr. Dhananjay Nath Tiwary, Advocate.
For the State : Mr. Ganesh Prasad Jaiswal, A.P.P.
For the Respondent : Mr. Ramakant Sharma, Senior Advocate.
(D.R.I.) : Mr. Radhika Raman, CGC.

CORAM: HONOURABLE MR. JUSTICE A. M. BADAR

and

HONOURABLE MR. JUSTICE SUNIL KUMAR PANWAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE A. M. BADAR)

Date : 06-05-2022

Criminal Appeal (DB) No.1139 of 2016 has been filed by accused no.3 Md. Khalik, Criminal Appeal (DB) No.1147 of 2016 has been filed by accused no.2 Md. Furkan whereas Criminal Appeal (DB) No.1060 of 2016 has been filed by accused no.1 Md. Jamir Alam Ali. By these appeals, they are challenging the Judgment and Order dated 15.09.2016 and 21.09.2016 respectively passed by the learned Additional Sessions Judge-VII, Patna, in Special Case No.15 of 2014 thereby convicting them of offences punishable under Sections 21(c), 27A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the “N.D.P.S.



Act”). On first two counts, they all are separately sentenced to suffer rigorous imprisonment for 12 years by each of them apart from payment of fine of Rs.1,00,000/- and in default, to undergo three years of default sentence by each of them. On third count, i.e., for the offence punishable under Section 29 of the N.D.P.S. Act, they all are sentenced to suffer rigorous imprisonment for 5 years. Substantive sentences are directed to run concurrently by the learned trial court. As all these appeals are arising out of the same Judgment and Order, they are being decided by this common Judgment. For the sake of convenience, the appellants/convicted accused shall be referred to in their original capacity as “an accused”.

2. Facts leading to the prosecution of the accused persons can be summarized thus:

(a). P.W.4 Anubhav Kumar, Intelligence Officer, Directorate of Revenue Intelligence, Regional Unit, Patna (hereinafter referred to as the “D.R.I.”) had filed a complaint alleging commission of offences punishable under Sections 21(c), 27(A) and 29 of the N.D.P.S. Act, 1985 against the appellants/accused no.1, Md. Jamir, appellant/accused no.2 Md. Furkan and appellant/accused no.3 Md. Khalik. Accused no.4 Md. Kadeer, accused no.5 Haji Kayyum, accused no.6 Haji



Mujib Pinda, accused no.7 Md. Siraj and accused no.8 Md. Izhar were also arraigned as absconding accused in the said complaint with an averment that these accused nos.4 to 8 were found absconding from their homes. Penal Sections of the N.D.P.S. Act invoked against the accused persons can be seen from paragraphs-17 and 18 of the said complaint which led to the registration of Special Case No.15 of 2014 and those paragraphs reads thus:

“17. That Md. Jamir Alam Ali, Md. Furkan and Md. Khalik were caught red handed while in possession of the packets containing Heroin and have admitted their conscious individual involvement in this act of smuggling or Heroin in lure of money. All the three accused, found in possession of of the packet containing such huge quantity of Heroin, appear consciously involved in the abatement, sale/purchase, carriage/transportation and possession of Heroin, and thus are liable to punishment under section 21(C) and 29 of the NDPS Act 1985.

18. That Md. Kadeer, Haji Kayyum, Haji Mujib Pinda,, Md. Siraj and Md. Izhar are absconding and have avoided their appearance before the investigating officer. Though, all of them have submitted in writing that they are innocent and responsible citizens, the way they are absconding



from their homes and the statement tendered by Jamir, Furkan, Khalik and his wife indicates that they are involved in this smuggling of Heroin. Khalik has stated that Kadeer, Haji Kayyum, Haji Mujib Pinda, Siraj and Izhar are equal partners and financier and used to take delivery of Heroin. This was also confirmed by Jamir and Smt Ruksar Bano, wife of Khalik in their statement. Furkan too was aware that the Heroin being carried by him was destined to Kadeer. Md. Izhar is village Head and in spite of that he was absent when the follow-up was conducted at his residence on 07.05.2014 and again on 22.07.2014. This shows that Md. Kadeer, Haji Kayyum, Haji Mujib Pinda, Md. Siraj and Md. Izhar are financiers and partners in this smuggling of Heroin and thus appears liable to punishment under section 27A and section 29 of the Act for committing offence in violation of section 8(C) of the said Act.”

Thus, so far as the accused nos.1 to 3, who were in appearance before the learned trial court are concerned, allegations are to the effect that they were found to be in conscious possession of Heroin which is an Opium derivative, a manufactured drug and were involved in its sell, purchase, transport, import and export inter State so also in abatement to commit the offence punishable under the N.D.P.S. Act. As against the absconding accused allegations, as seen from the



complaint, are to the effect that they were financiers and partners in smuggling of the Heroin so also in abetting the commission of such offence of smuggling and finance.

(b). Now, let us advert to the facts which led to filing of this complaint by P.W.4 Anubhav Kumar, the Intelligence Officer. According to the prosecution case, on 20.02.2014, P.W.5 Aditya Ranjan, the Intelligence Officer of the D.R.I. Patna, had received specific intelligence (Ext.32) from the Deputy Director, D.R.I., Lucknow, to the effect that accused no.1 Jamir and accused no.2 Furkan have brought two kilograms of Heroin from Manipur and the same will be handed over to accused no.3 Khalik on instructions of Md. Kadeer (absconding accused no.4). P.W.5 Aditya Ranjan had reduced that information in writing (Ext.32) and produced the same before his immediate Official Superior, i.e., the Deputy Director, D.R.I., Patna, who directed P.W.5 Aditya Ranjan to form a team and take action in the matter (Ext.32A). That is how, a team comprising of P.W.1 Dhirendra Kumar Singh, Intelligence Officer, P.W.2 Pradip Kumar Pandey, Intelligence Officer, and P.W.3 Yogeshwar Nath Tiwary, Intelligence Officer, as well as others came to be formed by P.W.5 Aditya Ranjan.



(c). That team of the D.R.I., Patna, then rushed to the Hotel Ashirward, Station Road, Patna, at about 17 hours (05.00 P.M.) on 20.02.2014 itself. Employees Arvind Kumar and Sudhir Kumar (not examined as witnesses) of that hotel were found present at the reception counter and they had agreed to act as Punch witnesses to the proceedings of the search and seizure. Taking them, the team of the D.R.I. went to the Room No.101 of Ashirwad Hotel, the door of which was found open. Accused no.1 Md. Jamir, accused no.2 Md. Furkan and accused no.3 Md. Khalik were found sitting on the bed of that room and each one of them was holding a brown polythene packet in their hand. P.W.5 Aditya Ranjan then, in compliance of Section 50 of the N.D.P.S. Act gave written options (Exts.8 to 10) to those accused persons for getting themselves searched in presence of the Gazetted Officer or the nearest Magistrate. All accused persons agreed in writing that they be searched by P.W.5 Aditya Ranjan, Intelligence Officer. Personal search of accused no.1 Md. Jamir, accused no.2 Md. Furkan and accused no.3 Md. Khalik was taken by P.W.5 Aditya Ranjan. The contents of the packets held by them (which were respectively marked as 'A', 'B' and 'C') was tested positive for Heroin. Accused were found to be possessing sundry articles such as blank cheque,



Debit-card, driving licence, mobile phones etc.

(d). As accused persons had requested the Officers of the D.R.I. to take them to some safe place for further proceedings, they all along with independent witnesses were taken to the office of the D.R.I., Patna, for safety and security reasons. Weightment of packets which were marked as 'A', 'B' and 'C' respectively found in possession of accused no.1 Md. Jamir, accused no.2 Md. Furkan and accused no.3 Md. Khalik was done. Gross weight of packet 'A' was found 615 grams, that of packet 'B' was found 613 grams and that of packet 'C' was found to be 615 grams, totaling 1.843 kilograms. Two samples each weighing 5 grams were drawn from the contents of packets marked as 'A', 'B' and 'C'. Those samples were kept in polythene pouches and marked as 'A-1', 'A-2', 'B-1', 'B-2', 'C-1' and 'C-2'. The samples were sealed with plastic adhesive tapes. Those packets were then kept in three envelopes marked as 'A-1 A-2', 'B-1 B-2', 'C-1 C-2'. Those envelopes were sealed. Packets 'A', 'B' and 'C' containing residual substance came to be sealed with adhesive tapes and those packets were separately kept in three envelopes, which were marked as 'A', 'B' and 'C'. The envelopes containing the residual substance came to be sealed.



(e). P.W.5 Aditya Ranjan then recorded the confessional statements Exts.13, 14 and 15 of all three accused by resorting the provisions of Section 67 of the N.D.P.S. Act, separately. As per those confessional statements, accused no.1 Md. Jamir made a deal with absconding accused Md. Kadeer to supply 1.8 kilograms of Heroin. Accused No.1 Jamir was informed by absconding accused Kadeer that accused no.3 Khalik will come to take delivery of Heroin. Accused no.1 Jamir asked accused no.2 Furkan to bring that consignment of Heroin procured by absconding accused Kadeer to Patna. That is how, accused no.2 Furkan brought Heroin to Patna on on 20.02.2014. Absconding accused Kadeer told accused no.3 Khalik to go to Patna and meet accused no.1 Jamir. Then all three accused persons, namely, accused no.1 Jamir, accused no.2 Furkan and accused no.3 Khalik met at Patna on 20.02.2014. They then went to Railway Station at Patna, booked a ticket for accused no.3 Khalik for Sultanpur. From there, they returned to Ashirwad Hotel, Patna. When accused no.1 Jamir and accused no.2 Furkan were in the process of handing over the Heroin to accused no.3 Khalik, they were caught by the team of the D.R.I. Patna. This is what the gist of the confessional statement of the accused persons is.



(f). Thereafter, P.W.5 Aditya Ranjan had seized the contraband at about 11.15 P.M. of 20.02.2014 vide Seizure Memo (Ext.4). On 21.02.2014, he sent report (Ext. 34) under Section 57 of the N.D.P.S. Act of arrest and seizure to the Deputy Director, D.R.I., Patna. On 20.02.2014 vide communication at Ext.11, P.W.5 Aditya Ranjan, Intelligence Officer, sent the samples marked as 'A-1', 'B-1' and 'C-1' to the Chemical Analyzer of the Joint Director Chemical Laboratory, Kolkata, through the Special Messenger. The Chemical Analyzer vide his report (Ext.12) dated 08.08.2014 confirmed the fact that the three samples which were in the form of brown colour powder tested positive for presence of Heroin, Morphine, 6- Monoacetyl Morphine and Codeiane. P.W.5 Aditya Ranjan then sent a request letter (Ex.29) for certifying the inventory. Accordingly, on 26.03.2014, Sri Upendra Kumar, the learned Judicial Magistrate certified the inventory as per the provisions of Section 52-A of the N.D.P.S. Act by recording that packets marked as 'A', 'B' and 'C' were respectively weighing 605 grams, 603 grams and 605 grams totaling to 1.813 kilograms (gross weight). The learned Judicial Magistrate then drew two samples from each packet which were marked as 'A', 'B' and 'C'. Those two samples drawn by him were marked as



‘A-3’, ‘A-4’, ‘B-3’, ‘B-4’ and ‘C-3’ ‘C-4’. Samples, the packets of which were marked as ‘A-3’, ‘B-3’ and ‘C-3’ by the learned Judicial Magistrate, First Class, were handed over by him to the Inspector of Godown, Customs, whereas the samples, which were marked as ‘A-4’, ‘B-4’ and ‘C-4’ from the respective packets, were kept by the learned Judicial Magistrate, First Class, for producing the same before the learned Special Court, Patna. The learned Judicial Magistrate, First Class, then issued the necessary certificate (Ext.30) certifying the inventory.

(g). It is averred in the complaint filed by P.W.5 Aditya Ranjan that steps were taken for securing the presence of accused nos.4 to 8 by issuing summons and by visiting their residence. However, none of them were found present in their residence.

(h). That is how, P.W.5 Aditya Ranjan had filed the complaint and by taking cognizance of the alleged offence, the learned trial court had framed the charge for the offences punishable under Section 21(c), 27A and 29 of the N.D.P.S. Act against all three accused persons, who were before it.

(i). In order to bring home the guilt to the accused, the prosecution has examined in all five witnesses. Those are:



(A).P.W.1 Dhirendra Kumar Singh- Intelligence Officer and Member of the raiding party.

(B). P.W.2 Pradip Kumar Pandey- Intelligence Officer and Member of the raiding party.

(C).P.W.3 Yogeshwar Nath Tiwary-Intelligence Officer and Member of the raiding party.

(D). P.W.4 Anubhav Kumar-the Intelligence Officer, who investigated the crime subsequent to the raid.

(E).P.W.5 Aditya Ranjan-The Complainant/ Intelligence Officer and the Investigating Officer who conducted raid and effected seizure.

(j). In addition to oral evidence of official witnesses, the prosecution has placed reliance on the documentary evidence in the form of following documents:

Sl. No.	Exhibit(s)	Description
1.	3	Panchnama of events at Ashirwad Hotel and the office of the D.R.I. leading to seizure of packets containing Heroin marked as 'A' 'B' and 'C' as well as pockets of samples drawn and marked 'A-1 A-2', 'B-1 B-2' 'C-1, C-2' so also the sundry articles from the accused persons.
2.	4	Seizure Memo of three packets marked 'A' , 'B' and 'C' allegedly containing Heroin by P.W.5 Aditya Ranjan.
3.	5, 6 and 7	Arrest Memos of accused persons.
4.	8 to 10	Option given to accused persons in writing about search by the Gazetted Officer or the nearing Magistrate in pursuant to Section 50 of the N.D.P.S. Act.



5.	11	Requisition to the Chemical Analyzer for testing contents of samples 'A-1', 'B-1', 'C-1' for detection of Heroin.
6.	12	Report of chemical analysis of samples 'A-1', 'B-1' 'C-1' mentioning presence of Heroin, Morphine, 6-Monoacetyl Morphine and Codeiance.
7.	13	Statement of accused Md. Jamir under Section 67 of the N.D.P.S. Act.
8.	14	Statement of accused Md. Furkan under Section 67 of the N.D.P.S. Act.
9.	15	Statement of accused Md. Khalik under Section 67 of the N.D.P.S. Act.
10.	16 to 20	Sundry documents seized from accused persons such as Railway Ticket, Blank Cheques and Chits.
11.	29	Request Letter by P.W.5 Aditya Ranjan to the Sessions Court, Patna, for certifying the inventory.
12.	30	Certification of inventory by the learned Judicial Magistrate, Patna.
13.	32, 32A	Forwarding of the recorded secret information regarding Heroin by P.W.5 Aditya Ranjan, the Intelligence Officer, to the Deputy Director of the D.R.I. and order of the said Superior Authority for formation of the team for raid.
14.	34	Report under Section 57 of the N.D.P.S. Act regarding seizure of 1.843 Kilograms of Heroin by P.W.5 Aditya Ranjan to the Deputy Director, D.R.I.
15.	33	Inventory of seized goods-Heroin.
16.	31, 31/1, 31/2	Envelopes containing samples 'A-4' 'B-4' 'C-4' of seized Heroin drawn by the learned Judicial Magistrate.

(k). The defence of the accused persons was that of total denial. They contented that they are falsely implicated in



the subject crime. Accused no.1 Jamir alleged that he had quarreled with the Officers of the D.R.I. and, therefore, he is falsely implicated in the subject crime.

(1). After hearing the parties, by the impugned Judgment and Order, the learned trial court was pleased to convict the accused persons and to sentence them as indicated in the opening paragraphs of this Judgment.

3. We heard the learned counsel appearing for the appellants at sufficient length of time. He argued that though two Panches, namely, Arvind Kumar and Sudhir Kumar had allegedly witnessed the search and seizure of Heroin, the prosecution has not examined them and the case of the prosecution is based on interested testimony of the official witnesses. It is further argued that the seized contraband was not produced in the trial court and, therefore, the case of the prosecution is rendered suspect. To buttress, this submission, reliance is placed on the **Judgment dated 28th and 29th September, 2017 passed in Criminal Appeal No.708 of 2010 Premsingh Hjarilal Jaiswal V/s. The State of Maharashtra by the Bombay High Court.** It was further argued that even the samples drawn by the learned Judicial Magistrate were not produced in the court. The learned counsel for the appellants



vehemently argued that there is total non compliance of provisions of Section 313 of the Code of Criminal Procedure. The questions which ought to have been put to the accused for seeking their explanation for basing the conviction on the evidence adduced by the prosecution were not put to them and thereby the entire trial is vitiated. It is submitted that as the relevant circumstances were not put to the accused persons those are required to be kept out of consideration and if it is done so, then no evidence remains against the accused persons. To buttress this submission, reliance is also placed on the Judgment of the Division Bench of this Court in the matter of **Jagat Prasad Vs. The State of Bihar and Anr.**, reported in **2022(1) PLJR 568.**

4. As against this, the learned Senior Advocate appearing for the Respondent/Original Complainant argued that the accused persons were found in conscious possession of Heroin weighing more than 1.800 kilograms and evidence adduced by the prosecution through its official witnesses is trustworthy and reliable. Non-examination of Panch witnesses is of no consequence. It is further argued that accused persons have failed to point out any prejudice caused to them in their examination under Section 313 of the Code of Criminal



Procedure. It is further argued that necessary questions were put to the accused by the learned trial court and, therefore, it cannot be said that there was no proper examination of the accused persons under Section 313 of the Code of Criminal Procedure. Mr. Ramakant Sharma, the learned Senior Advocate appearing for the Respondent placed reliance on the Judgment of the Hon'ble Apex Court in **Criminal Appeal No.1479 of 2008 Dharampal Singh Vs. State of Punjab decided on 9th September, 2010** on this aspect of the matter.

5. We have carefully considered the submissions so advanced and also perused the records and proceedings.

6. Now let us put on record version of official witnesses examined by the prosecution which is congruous and in tune with the prosecution case.

7. P.W.5 Aditya Ranjan, the Intelligence Officer of the D.R.I., Patna, had received the secret information in respect of the purchase and sale as well as smuggling of Heroin on 20.02.2014 and as per his version, after recording the same, he had forwarded the same to the immediate Official Superior, i.e., the Deputy Director, D.R.I., Patna, who had then directed for forming a team for conducting raid and this version of P.W.5 Aditya Ranjan is gaining corroboration from the



contemporaneously recorded secret informant (Ext.32) and direction thereon by the Deputy Director, D.R.I., Patna, for taking action by forming team which is at Ext.32A. P.W.5 Aditya Ranjan deposed that then he formed the team comprising of P.W.1 Dharendra Kumar Singh, P.W.2 Pradip Kumar Pandey, P.W.3 Yogeshwar Nath Tiwary apart from himself and the team then went to the Hotel Ashirwad, Patna. As per version of P.W.5 Aditya Ranjan then two employees of the Hotel including Arvind Kumar had agree to act as Panch Witnesses. Then they all went to Room No.101 of that Hotel and found all three accused persons in that room holding one polythene packet each, which was found to be sealed by the tape. P.W.5 Aditya Ranjan then stated that he gave option under Section 50 of the N.D.P.S. Act (Exts.8 to 10) to all of them but they all expressed that P.W.5 Aditya Ranjan can take their search. P.W.5 Aditya Ranjan testified that then he examined brown power found in the packet held by accused no.1 Md. Jamir by the field testing kit and that substance tested for positive of Heroin. He has also spoken about the personal search of accused Md. Jamir. In the similar way, P.W.5 Aditya Ranjan deposed about testing the substance found in the packets held by accused Furkan and accused Khalik by the field testing kit and about finding that



substance as Heroin. This witness has also stated that personal search of the accused persons yielded in recovery of sundry articles. Thereafter, as stated by this witness, the accused persons along with the envelopes found with them containing wet brown powder, which were marked as 'A', 'B' 'C', were taken to the office of the D.R.I. As per his version, gross weight of packet 'A' and 'C' was found to be 615 grams and gross weight of packet 'B' was found to be 613 grams. He has also spoken about drawing two samples each weighing 5 grams from each of three packets and marking them as 'A-1 A-2', 'B-1 B-2', and 'C-1 C-2'. P.W.5 Aditya Ranjan had testified about sealing and packing those packets as well as samples drawn from those packets. He has also deposed that thereafter Panchnama (Ext.3) of the event took place came to be recorded and about preparation of Seizure Memo (Ext.4) seizing Heroin weighing 1.843 Kilograms (gross). As stated by P.W.5 Aditya Ranjan then three samples, which were marked as 'A-1', 'B-1', 'C-1' seized from accused persons were sent for chemical analysis to the Chemical Laboratory, Kolkata vide Test Memo (Ext.11) as well as recording of confessional statements Ext.13, 14 and 15 of the accused Jamir, Furkan and Khalik respectively. Seizure of sundry articles from the accused persons is also



deposed by him. As stated by P.W.5 Aditya Ranjan, then he applied for certification of inventory to the Sessions Judge, Patna, vide Request Letter (Ext.29) as well as further action about certification of the inventory by the Judicial Magistrate and receipt of Certificate (Ext.32) to that effect from the Judicial Magistrate. As stated by P.W.5 Aditya Ranjan, samples in packets 'A-4', 'B-4' and 'C-4' before the court are the samples drawn by the learned Judicial Magistrate while certifying the inventory. The packets containing samples of Heroin seized from accused persons then came to be marked as Exts.31, 31/1 and 31/2. This witness proved the documents prepared during the course of search and seizure of the contraband.

8. In cross examination, P.W.5 Aditya Ranjan has confirmed that recorded secret information was produced by him before the Deputy Director. He accepted the fact that Arrest Memos are not bearing the signatures of members of the team. He reiterated that Heroin was detected in the packets held by the accused persons when they were tested by the field testing kit. He admitted that in the chemical analysis of the seized substance, percentage of Morphine is not mentioned. He denied that by exerting pressure, signature of accused persons was taken on option given to them under Section 50 of the N.D.P.S.



Act. He denied that because of quarrel with the accused at the counter of the Hotel, they are falsely implicated in the instant case. This is what is the evidence of complainant Aditya Ranjan.

9. P.W.1 Dhirendra Kumar Singh is also the Officer of the D.R.I and one of the members of the raiding team. His version is in tune with the version of complainant-P.W.5 Aditya Ranjan. In cross examination, he has stated that on telephonic instructions, he joined raiding party. He admitted that his signature is not there on the documents such as Panchnama, search-cum-seizure list, arrest memo etc.

10. P.W.2 Pradip Kumar Pandey is another Officer of the D.R.I., who was member of the raiding team. His version is congruous to that of P.W.5 Aditya Ranjan. He has also spoken about the raid at Room No.101 of the Hotel Ashirwad and finding the accused persons thereat holding three packets containing Heroin. He testified about further proceeding leading to seizure of the contraband. In cross-examination, he stated that he received oral order from P.W.5 Aditya Ranjan to join the raiding party. He denied the suggestion that the accused persons are falsely implicated in the subject crime.

11. Similar is the version of P.W.3 Yogeshwar Nath



Tiway, another member of the raiding party and the employee of the D.R.I. He has also stated about raid at Room No.101 of the Hotel Ashirwad leading to seizure of three packets containing Heroin from accused persons. In cross examination, he stated that no written orders were issued directing him to join the raiding party. He stated that accused were searched and arrested in his presence and then further proceedings were taken at the office of the D.R.I. He admitted that his signature is not there on the seizure list, arrest memos and Panchnama. He denied that there was quarrel between the accused and P.W.5 Aditya Ranjan leading to their false implication.

12. P.W.4 Anubhav Kumar is the Intelligence Officer who conducted further investigation after transfer of P.W.5 Aditya Ranjan. His evidence is primarily in respect of the follow up action taken by him after search and seizure and he is not an eye witness to the incident of search and seizure. He has stated that he is not knowing as to with whom the samples were from 20.02.2014 to 22.02.2014. He stated that there is no Malkhana in his office. He stated that the samples drawn from the seized substance were deposited in the godown on 24.02.2014.

13. On the basis of oral as well as documentary



evidence adduced by the prosecution in the instant case, as stated in the foregoing paragraphs, all three accused came to be convicted of the offences punishable under Sections 21(c), 27A and 29 of the N.D.P.S. Act. Apart from sentencing them to rigorous imprisonment for 12 years on first two counts, they are also directed to pay fine of Rs.1,00,000/- by each of them on first and second count. On third count, they are sentenced to suffer rigorous imprisonment for five years. Conviction of the accused persons, as seen from the Judgment of the learned trial court, is based on several circumstances appearing in evidence adduced by the prosecution and accepted as proved by the learned trial Court for basing the conviction and resultant sentence. Amongst other, following are those circumstances:-

(I). P.W.5 Aditya Ranjan , Intelligence Officer, had received secret information from the Deputy Director, D.R.I., Lucknow, telephonically to the effect that accused no.1 Md. Jamir and accused no.2 Md. Furkan have brought two kilograms of Heroin from Manipur and they were giving the same to accused no.3 Md. Khalik at Hotel Ashirwad, Patna, on 20.02.2014. By recording this information (Ext.32), it was submitted to the immediate Official Superior, i.e. the Deputy Director, D.R.I., Patna, who ordered (Ext.32A) to form a team



and take action immediately.

(II). P.W.5 Aditya Ranjan then formed a team comprising of himself, P.W.1, Dharendra Kumar Singh, P.W.2 Pradip Kumar Pandey and P.W.3 Yogeshwar Nath Tiwary- all officials of the D.R.I., Patna, and the team then conducted raid at Room No.101 of Hotel Ashirward, Patna, on 20.02.2014 by taking aid of Arvind Kumar and Sudhir Kumar- employees of that hotel, as independent Panch witnesses.

(III). All three accused persons were found in Room No.101 of that hotel holding one packet each, containing wet brown powder which had tested positive for Heroin.

(IV). P.W.5 Aditya Ranjan prior to taking personal search of all the three accused persons had given them option (Exts.8 to 10) for complying the provisions of Section 50 of the N.D.P.S. Act by informing the accused persons that on their request search can be taken in presence of the Gazetted Officer or the Magistrate.

(V). Packet held by accused no.1 Jamir was marked as 'A', that which was held by accused no.2 Furkan was marked as 'B' and the packet held by accused no.3 Khalik was marked as 'C', while conducting search at Hotel Ashirward, Patna.

(VI). In personal search of all accused persons,



sundry articles such as Railway Tickets, Chits, Blank cheques, Driving License, mobile phones were found.

(VII). From Hotel Ashirward on 20.02.2014 itself, all three accused persons and packet nos. 'A', 'B' and 'C' found with them as well as other articles with them were taken to the office of the D.R.I., Patna.

(VIII). On 20.02.2014 itself, weighment of the packets found with all accused persons was conducted at the office of the D.R.I., Patna. Packet 'A' found with accused Jamir was weighing 615 grams, packet 'B' of Furkan was weighing 613 grams and packet 'C' of Khalik was weighing 615 grams and total gross weight of all those three packets was found to be 1.843 Kilograms.

(IX). At the office of the D.R.I., two samples each weighing 5.00 grams were taken separately from the substance found in packets 'A', 'B' and 'C'. Those samples were marked as 'A-1 A-2', 'B-1 B-2' and 'C-1 C-2'. Those samples were separately kept in polythene pouches. The pouches were sealed by tape and were kept in envelopes separately.

(X). Packets 'A', 'B' and 'C' containing remaining substance weighing 605 grams, 603 grams and 605 grams respectively were again sealed by tape.



(XI). Events which took place during search and seizure of Heroin from accused persons, drawing samples from the packets, sealing them after packing came to be recorded by seizure Panchnama (Ext.3) which was prepared at Hotel Ashirwad, Patna as well as the office of the D.R.I. Patna.

(XII). By preparing seizure memo (Ext.4) on 20.02.2014, P.W.5 Aditya Ranjan had seized Heroin in three packets 'A', 'B' 'C' grossly weighing 1843 grams from all three accused persons.

(XIII). Samples 'A-1', 'B-1' 'C-1' drawn from the packets found in possession of the accused persons were sent vide Test Memo (Exts.11/43) by P.W.5 Aditya Ranjan to the Chemical Laboratory, Kolkata with a request to ascertain whether the brown powder in the samples is Heroin or any other drgus under the N.D.P.S. Act.

(XIV). Vide report dated 08.08.2014, the Chemical Analyzer reported that on the basis of the chemical and chromatographic examination it is inferred that each samples answers positive tests for presence of Heroin, Morphine, 6-Monoacetyl Morphine and Codeiane.

(XV). P.W.5 Aditya Ranjan vide Request Letter (Ext.29) requested for certification of inventory to the Sessions



Judge, Patna and vide Certificate (Ext.30), the Judicial Magistrate certified that he checked three packets marked 'A', 'B' and 'C' weighing 605 grams, 603 grams and 605 grams and drew two samples from each packet 'A', 'B' and 'C'. Those samples were packed and marked as 'A-3 A-4', 'B-3 B-4' and 'C-3, C-4' respectively. Samples in envelopes 'A-3', 'B-3' and 'C-3' were handed over to the Inspector of Godown whereas remaining three samples were retained for production before the court by him.

(XVI) Samples drawn from packets marked as A, B and C were produced before the learned trial Court and those were proved through evidence of PW 5 Aditya Ranjan and were marked as Exts. 31, 31/1 and 31/2.

(XVII). Accused No.1 Jamir Alam Ali made confessional statement (Ext-1/3) under Section 67 of the N.D.P.S. Act and admitted that seized Heroin was given to him by Amir @ Javed Hussein for sale and he was to receive commission of Rs.20,000/- per kilogram on sale of Heroin. He admitted that he received an amount of Rs.7,000/- as advance.

(XVIII). Accused No.2 Md. Furkan in his confessional statement under Section 67 of the N.D.P.S. Act admitted that accused No.1 Jamir Alam Ali asked him to bring



Heroin to Patna and for this work he received an amount of Rs.10,000/-. Accused No.2 Md. Furkan admitted that he received Heroin weighing 1.800 Kg from a person named Amar and he brought that Heroin to Patna on 20.02.2014.

(XIX). Accused No.3 Md. Khalik in his confessional statement recorded under Section 67 of the N.D.P.S. Act admitted that on earlier occasion he had delivered Heroin to Md. Kadir, Md. Izhar etc. by bringing that Heroin from Jharkhand.

(XX). All accused persons in their confessional statements have admitted that from their possession Heroin came to be seized and that they accept their guilt.

(XXI). On 21.02.2014 report Ext-34, under Section 57 of the N.D.P.S. Act, regarding arrest and seizure of Heroin was sent by PW 5 Aditya Ranjan to Superior Officer, i.e., the Deputy Director, D.R.I., Patna.

14. Let us now deal with contention that due to improper examination of the accused under Section 313 Cr.P.C. as per the mandate of law, the appellants are entitled for acquittal. It would be apposite to quote provision of Section 313 Cr.P.C. for better understanding of the issue. It reads thus:-

“313. Power to examine the accused.-

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any



circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.”

15. Legislative provision enshrined in Section 313 of the Cr.P.C. is based on the principle of natural justice described in maxim ‘*audi alteram partem*’- meaning thereby that nobody should be condemned unheard. Principle of fair trial requires that all incriminating circumstances appearing against the



accused must be put to him in order to afford him an opportunity of explaining those circumstance. The trial Court is duty bound to question the accused on the evidences and circumstances appearing against him in order to enable the accused to understand the exact case which he is required to meet and whether or not to adduce any evidence in his defence. The material which is not put to the accused is required to be eschewed from consideration. At this stage, we may quote the law laid down by the Hon'ble Apex Court in **Sharad Birdhi Chand Sarda Vs. State of Maharashtra (AIR 1984 SC 1662)** wherein it is held thus:

“As these circumstances were not put to the Appellants in their statement under Section 313 of the Code of Criminal Procedure they must be completely excluded from consideration because the Appellants did not have any chance to explain them. This has been consistently held by this Court as far back as 1953, wherein the case of Hata Singh Bhagat Vs. State of Madhya Bharat MANU/SC/0073/1951; AIR 1953 SC 468 this Court held that any circumstances in respect of which an accused was not examined under Section 342 of the Code of Criminal Procedure



cannot be used against him. Ever since this decision there is a catena of authorities of this Court uniformly taking the view that unless the circumstances appearing against an accused is put to him in his examination under Section 342 of Section 313 of the Criminal Procedure Code, the same cannot be used against him... It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court in this view of the matter the circumstances, which were not put to the Appellant in his examination under Section 313 of the Code of Criminal Procedure have to be completely excluded from consideration.”

(Emphasis is supplied by me)

Even in the case of State of Maharashtra Vs. Sukdeo Singh and Another (AIR 1992 SC 2100), their Lordship have observed as follows-

“The trial Judge is not expected, before he examined the accused under Section 313 of the Code, to sift the evidence regarding any incriminating material to determine whether or not to examine the accused as that material. To do so, would be to



prejudice the evidence without hearing the prosecution under Section 314 of the Code. Therefore, no matter how weak or scanty prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation thereon.”

16. In Samsul Haque Vs. State of Assam (AIR 2019

SC 922), it is held thus in para-22 of their Lordships:-

“22. It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in Asraf Ali V. State of Assam reported in 2008 AIR SCW 5608, Para 13. The relevant observations are in the following paragraphs:

“21. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain



any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

*22. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in *S. Harnam Singh V. The State* (AIR 1976 SC 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the*



Code). Non-indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise.”

17. In the matter of **Jagat Prasad (Supra)** the Hon’ble Division Bench of this Court has taken a brief review of the law on Section 313 of the Code of Criminal Procedure and has held that the circumstances which were never put to the accused in his examination under Section 313 Cr.P.C could not have been used for his conviction and by giving benefit of doubt, the accused came to be acquitted. It is necessary to quote relevant paragraph Nos.68, 69, 70, 71, 74 and 75 which reads thus:-

“68. The plain reading of Section 313 of the Cr.P.C. would demonstrate that the question under clause (1)(a) is discretionary. It empowers the court to put such questions to the accused as the court considers necessary for the purposes of enabling him personally to explain any circumstances appearing in the evidence against him at any stage without previously warning. However, clause (1)(b) empowers the court to question the accused generally on the day



after the witnesses for the prosecution have been examined and before he is called upon for his defence. It casts a duty on court to give an opportunity to the accused to explain the incriminating material against him.

69. ***In State of U.P. Vs. Mohd. Iqram & Anr***, since reported in ***AIR 2011 SC 2296***, the Supreme Court held :

“Attention of the accused must specifically be drawn to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Court is under legal obligation to put all incriminating circumstances before accused to solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused. Circumstances not put to the accused in his examination under section 313, cannot be used against him.”

70. In ***Naval Kishore Vs. State of Bihar***, since reported in ***(2004) 7 SCC 502***, the Supreme Court observed that the opportunity of examination under section 313 given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect



appreciation of evidence. In the said case, the Supreme Court further observed that the practice of putting the entire evidence against the accused in a single question and giving an opportunity to explain the same is improper as the accused may not be in a position to give a rational and intelligent explanation.

71. It is well settled that the object of Section 313 of the Code is to enable the accused to explain the circumstances against him in the evidence personally except where the statute provides otherwise.

74. In my view, since no question was asked from the appellant on the circumstances referred to in the aforesaid paragraph, he did not have any chance to explain those circumstances. The circumstances which were never put to the appellant while examining him under Section 313 of the Cr.P.C. could not have been used for his conviction. Though there was no evidence that the appellant was transporting the narcotic substance in connivance with the drug peddlers from Indo-Nepal border which was being financed by Raj Kumar, the Trial Court put the said question to the appellant. Surprisingly, the circumstances put forth



by the witnesses in their testimonies were not brought to the notice of the appellant and the circumstances which have not been led in evidence were put to him while examining him under Section 313 of the Cr.P.C.

75. Thus, on appreciation of the entire evidence, I am of the opinion that there are serious infirmities in the prosecution evidence. Hence, the judgment of conviction and the consequent order of sentence passed by the Trial Court cannot be sustained.”

18. If translated freely in English, statement of the accused under Section 313 Cr.P.C. is as under with common answers given by all the three accused to question Nos.1 to 4 and their different answers to question No.5.

Question No.1: Have you heard the evidence adduced by witnesses?

Ans: Yes.

Question No.2: You are charged and it is in evidence that you on 20.02.2014 at Room No.101 of Ashirwad Hotel, Station Road, Patna, was doing the sale and purchase of Heroin.

Ans: No.



Question No.3: You are charged and it is in evidence that when on the basis of secret information, raiding team reached Room No.101 of Hotel Ashirwad, you were seen holding a packet in your hand and sitting on the bed which was containing a substance like Heroin on testing by departmental kit and the total weight of which was 1843 grams and price rupees 11 lacs?

Ans: No.

Question No.4: You are charged and it is in evidence that all legal action under NDPS Act was taken in respect of seized article?

Ans: No.

Question No.5: What have you to say in your defence?

Ans of Accused No.1 Jamir Alam Ali - I am innocent. Falsely implicated. There was quarrel with Officer of the DRI who was in civil dress. Hence, I am falsely implicated.

Ans of Accused No.2 Md. Furkan - I am innocent. I am falsely implicated and sent in



Jail by the DRI.

Ans of Accused No.3 Md. Khalik- I am innocent. Falsely implicated.

19. Perusal of statements of all accused persons recorded under Section 313 of the Cr.P.C. by examining them by the learned trial Court makes it clear that not a single incriminating circumstance appearing in evidence adduced by the prosecution was put to any of the accused persons. Cryptic and misleading questions seems to be put to the accused and as seen from the record of their examination under Section 313 Cr.P.C., the learned trial Judge has not even formally asked them as to what they have to say about the circumstance pointed out in such question. Question No.3 which was put up to the accused persons seems to be totally misconceived and misleading the accused. According to the prosecution case, which is held to be proved by the learned trial Court. Accused No.1 Jamir was holding a packet marked 'A' which was containing 615 gms of Heroin, accused No.2 Furkan was holding a packet marked 'B' containing 613 gms of Heroin whereas accused No.3 Khalik was holding a packet marked 'C' containing 615 gms of Heroin. Evidence adduced by the prosecution was to the effect that when wet brown powder in



all those three packets which were individually held by three accused persons was subjected to test by using the Field Testing Kit, the same was found to be Heroin. This is categorically stated by the prosecution witnesses and is also reflected from the Punchnama of events happened during the raid which is at Ext-3. When the learned trial Court, on the basis of this evidence as well as on the basis of report of chemical analyzer has held that the seized substance was Heroin, a manufactured drug, and possession thereof is the offence punishable under Section 21(c) of the N.D.P.S. Act, it was incumbent on the part of the learned trial Judge to put these circumstances by separate questions to the accused persons in their statements under Section 313 of the Cr.P.C. and that they ought to have been informed that they were found to be possessing Heroin. By framing proper intelligible short and simple questions they ought to have been given an opportunity to explain their stand. However, what was asked to them is to the effect that they were possessing a packet containing a substance like Heroin weighing 1843 grams. Though all the three accused persons were allegedly holding the packets A, B and C individually containing 615 gms, 613 gms and 615 gms of Heroin, in complex question No.3 they were informed that individually



each of them was holding a packet in his hand containing a substance like Heroin weighing 1843 gms. They were not even specifically questioned about actually possessing Heroin by them in order to enable them to give their explanation in that regard during the course of their examination under Section 313 of the Cr.P.C. They were informed that they were possessing substance like Heroin. When accused No.1 Md. Jamir, according to the evidence adduced by the prosecution, was holding a packet marked 'A' containing 615 gms when accused No.2 Md. Furkan was holding a packet marked 'B' containing 613 gms of Heroin and when accused No.3 md. Khalik was holding a packet containing 615 gms of Heroin, asking each of them to explain their individual possession over 1483 gms of a substance like Heroin in a packet held by each of them individually is certainly misleading the accused and preventing them from submitting their explanation to the incriminating evidence appearing against them in the trial. The prejudice caused to each of the accused by wrongly framed misleading question No.3 is writ large from the record. It is really surprising that the accused were not even informed by the learned trial Court that as per the report of the C.A., they were actually found in possession of Heroin and as such, they were



virtually prevented from giving explanation to the evidence adduced by the prosecution which was ultimately used for convicting all of them for serious offences.

20. It is thus clear that circumstances Nos.I to XXI which were appearing in oral as well as documentary evidence against the accused persons and which were actually pressed in service to record conviction and resultant sentence were not put to the accused persons by framing simple questions regarding each and every individual circumstances for seeking explanation of the accused persons on such evidence appearing against them. As these circumstances were not put to them, the accused persons did not have any chance to explain those circumstances and to understand case of the prosecution against them. Perusal of the questions put to the accused persons in their examination under Section 313 Cr.P.C. by the learned trial Court makes it clear that the learned trial Court had deprived the accused persons of the fair trial by abdicating its duty to put each and every incriminating circumstance separately to the accused for giving him fair opportunity to tender their explanation regarding the same. Rather by framing and putting question No.4 to the effect that all legal action under N.D.P.S. Act was taken in respect of the seized articles, the learned trial



Court had virtually put the entire evidence against the accused in such a cryptic single question, when at least there are XXI incriminating circumstances appearing against the accused persons in the oral as well as documentary evidence tendered by the prosecution. The learned trial Court as such has failed to comply its statutory duty as envisaged by mandate of Section 313 Cr.P.C., by indulging in examining the accused persons in most casual and careless manner and thereby depriving them of an opportunity to explain the circumstances against them appearing in evidence, personally. It is seen that the accused persons, as such, could not understand the case of the prosecution and the oral evidence adduced by the prosecution witnesses so also the documentary evidence in the form of the report of the chemical analysis which was to the effect that the seized substance is Heroin. The accused as such cannot be said to be in a position to give rational and intelligent explanation to the circumstances appearing in evidence adduced by the prosecution. If the circumstances No.I to XXI culled out by this Court in foregoing paragraph from the evidence adduced by the prosecution are, therefore, eschewed from consideration as those were not put to any of the accused persons, then there remains no evidence to connect the accused



persons to the crime in question.

21. We have carefully perused the judgment in the matter of **Dharmpal Singh (Supra)**, wherein it is held thus in paragraph-12:

“.....As part of fair trial, Section 313 of the Code of Criminal Procedure requires giving opportunity to the accused to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. The purpose behind it is to enable the accused to explain those circumstances. It is not necessary to put entire prosecution evidence and elicit answer but only those circumstances which are adverse to the accused and his explanation would help the Court in evaluating the evidence properly. The circumstances are to be put and not the conclusion. It is not an idle formality and questioning must be fair and couched in a form intelligible to the accused. But it does not follow that omission will necessarily vitiate the trial. The trial would be vitiated on this score only when on fact it is found that it had occasioned a failure of justice.”

We have already put on record the incriminating circumstances appearing against all accused persons in the oral



as well as documentary evidence adduced by the prosecution. We have also reproduced the entire text of the examination of the accused persons under Section 313 of the Code of Criminal Procedure conducted by the learned trial Court. We have also noted down that not a single incriminating circumstance was put to any of the accused persons while examining them under Section 313 of the Code of Criminal Procedure by the learned trial Court. They were even not specifically informed that the substance which were found in their possession was Heroin- a manufactured drug inviting penal consequences under the N.D.P.S. Act. Misguiding question was put to the accused persons by stating that they were possessing a substance like Heroin. They were even misguided about the weight of the substance allegedly found in possession of each of them by putting incorrect question to them in a slipshod manner by the learned trial Court. Without putting any of the circumstance appearing against the accused persons to them while examining them under Section 313 of the Cr.P.C., the learned trial Court was pleased to convict them of serious offences punishable under Sections 21(c), 27A and 29 of the N.D.P.S. Act. Complete go bye was given to the mandatory provision of Section 313 of the Cr.P.C. by the learned trial Court. In such



circumstances, nothing more is required to demonstrate failure and miscarriage of justice and that too due to failure of duty by the learned trial Court.

22. Perusal of the impugned judgment makes it clear that the learned trial Court relied on confession of all accused persons in the light of provisions of Section 67 of the N.D.P.S. Act. The learned trial Court categorically held in the impugned judgment of conviction that the accused persons have admitted their guilt and have also admitted that Heroin was seized from them. The learned trial Court further observed that accused No.1 and accused No.2 brought Heroin weighing 1.8 Kg to Patna on the basis of their confessional statements. Confessional statement of the accused persons (Exts.13 to 15) were relied by the learned trial Court for holding that they were indulging in possession, sale, purchase and import as well as export of the Heroin. On the basis of their confessional statements, offences punishable under Sections 21(c), 27A and 29 of the N.D.P.S. Act were held to be proved against them. However, these confessional statements of the accused Exts-13 to 15 and their alleged version found therein was never put to any of the accused persons in their examination under Section 313 of the Cr.P.C. for seeking their explanation. Without bringing the



confessional statements relied by the prosecution to their notice, those were used against the accused persons for convicting them of serious offences.

23. It is needless to mention here that as per the law laid down by the Hon'ble Apex Court in the matter of **Tofan Singh Vs. State of Tamilnadu** reported in **(2021) 4 SCC 1**, the confessional statement made under Section 67 of the N.D.P.S. Act before an Intelligence Officer of the D.R.I. would not be admissible in law for recording conviction against the accused persons. It is held in the said matter that the Officers, who are invested with the power under Section 53 of the N.D.P.S. Act are "Police Officers" within the meaning of Section 25 of the Evidence Act and, therefore, any confessional statement made before such Officers would attract the bar of Section 25 of the Evidence Act and cannot be taken into consideration for recording conviction against the accused. Thus, confessional statement of the accused persons at Exts. 13 to 15 could not have been taken into consideration for holding that the offences alleged against the accused persons are proved.

24. Whenever material circumstances are not put to the accused in order to enable him to explain the incriminating evidence appearing against him, the following course of action



is available to the appellate Court.

(A). Whenever a plea of non-compliance of Section 313 Code of Criminal Procedure is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate Court any reasonable explanation of such circumstance, the Court may assume that the accused has no acceptable explanation to offer.

(B). In the facts and circumstances of the case, if the appellate Court comes to the condition that no prejudice was caused or no failure of justice was occasioned, the appellate Court can hear and decide the matter upon merits.

(C). If the appellate Court is of the opinion that non-compliance with the provisions of Section 313 of the Code of Criminal Procedure has occasioned or is likely to have occasioned prejudice to the accused, the appellate Court



may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 of the Code of Criminal Procedure and the trial Judge can be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh.

(D). The appellate Court may decline to remit the matter to the trial Court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.

25. In the case in hand, all the accused persons/appellants are behind bars from 20.02.2014, i.e., more than eight years. They were deprived of fair trial. Even these appeals are of the year 2016. Considering the facts situation of the instant case wherein examination of the accused persons was done in most casual and perfunctory manner without putting the



single circumstance appearing against them to the accused persons, we are of the considered opinion that the accused cannot be made to suffer for leches and omission on the part of the trial Court, by remand of the case for appropriate examination of the accused persons under Section 313 of the Code of Criminal Procedure. We deem it not proper to exercise such powers by ourselves in the light of the fact that the accused persons have already undergone sentence of more than eight years. In somewhat similar situation in the case of **Machander V. State of Haryana (AIR 1955 SC 792)**, the Hon'ble Apex Court considered it inappropriate to remand the case for examination of the accused when a period of four and half years had passed.

26. As seen by evidence adduced by the prosecution, the search and seizure of the Heroin was conducted on 20.02.2014. Samples A/1 A/2, B/1 B/2 and C/1 C/2 were also drawn from the bulk on 20.02.2014 itself. However, Test Memos signed by PW 5 Aditya Ranjan, forwarding samples A-1, B-1 and C-1 to the Chemical Laboratory is not bearing the date of sending those samples. Evidence adduced by the prosecution witnesses is conspicuously silent about the date on which those samples were sent to the Chemical Laboratory. The



prosecution has not adduced any evidence regarding keeping those samples in the safe custody till they were forwarded to the Chemical Laboratory and that they were sent and received in the sealed condition at the Chemical Laboratory. It is seen on the undated Test Memo signed by PW 5 Aditya Ranjan, there is an endorsement of the Chemical Laboratory that weighing of the samples was done on 25.02.2014. Thus, it was incumbent on the prosecution to demonstrate that the samples were in safe custody with seals intact upto 25.02.2014. No such evidence is forthcoming, on the contrary, evidence of PW 4 Anubhav Kumar, the Intelligence Officer shows that there is no Malkhana in the Office of the D.R.I. Patna. He had candidly stated before the Court that he is not aware as to with whom the samples were from 20.02.2014 to 22.02.2014. Thus, possibility of tampering the samples during this period cannot be ruled out.

27. We note for rejection the argument of the learned counsel for the appellants that neither the bulk nor samples of the seized material were produced before the learned trial Court. Evidence of PW 5 Aditya Ranjan is clear on this aspect. Samples drawn from the seized substance were very much before the learned trial Court vide Exts. 31, 31/1 and 31/2. In this view of the matter, judgment in the matter of **Prem Singh**



Jaiswal (Supra) is of no consequence.

28. Thus, the appeals deserve to be allowed by holding that the appellants are entitled to get the benefit of doubt for the reasons stated in the foregoing para and as such, the order:-

(I). The appeals are allowed.

(ii). The impugned judgment of conviction dated 15.09.2016 and the resultant order of sentence dated 21.09.2016 passed by the learned Additional Sessions Judge-VII, Patna, in Special Case No.15 of 2014 between the parties is quashed and set aside. The appellants/accused are acquitted of the charges levelled against them. They are directed to be set at liberty forthwith unless their detention is required in any other case. Fine amount, if any, paid by them be refunded to them.

(A. M. Badar, J)

(Sunil Kumar Panwar, J)

P.S./MKr/-

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